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No. 09-1209

In the Supreme Court of the United States

LEO TSIMMER, PETITIONER

v.

ANDREA QUARANTILLO, NEW YORK DISTRICT DIRECTOR OF THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's holdings that it lacked jurisdiction over petitioner's challenge to his order of exclusion and that, in the alternative, petitioner's claims are barred by res judicata.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 3a-6a) is not published in the *Federal Reporter* but is reprinted in 353 Fed. Appx. 661. The opinion of the district court (Pet. App. 7a-26a) is reported at 550 F. Supp. 2d 438. A prior relevant order of the court of appeals (Pet. App. 63a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2009. A petition for rehearing was denied on February 4, 2010 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on April 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), an alien who marries a United States citizen is initially conferred lawful resident status on a conditional basis. 8 U.S.C. 1154(a)(1)(A)(i) and (ii), 1186a(a)(1). To remove the condition on that status, the alien and the U.S. citizen spouse must jointly petition the Attorney General within the 90-day period immediately prior to the two year anniversary of the granting of conditional lawful residency. 8 U.S.C. 1186a(c)(1) and (d)(2).

The joint petition must "request[] the removal of [the] conditional basis" and "state[], under penalty of perjury," certain information establishing that the marriage is bona fide. See 8 U.S.C. 1186a(c)(1)(A) and (d)(1). The petition must be accompanied by an administrative fee. See 8 C.F.R. 216.4(a). The petition is to be filed using Form I-751, Petition to Remove the Conditions on Residence. See http://www.uscis.gov/i-751. The failure to timely and properly file the joint petition results in the termination of resident status as of the second anniversary of the lawful admission for permanent residence. 8 U.S.C. 1186a(c)(2)(A).

2. Petitioner is a native of the former Soviet Union who married a United States citizen in 1989 in Madison, Wisconsin, when he was a student. Pet. App. 9a. Based on his marriage, petitioner was accorded conditional lawful residence on April 23, 1990. *Ibid.*

The former Immigration and Naturalization Service (INS) was then contacted by an individual who gave a sworn statement that her roommate was romantically involved with petitioner and that petitioner's marriage was a sham marriage entered into for immigration purposes. Pet. App. 9a-10a.

Six days before the expiration of petitioner's conditional resident status, he and his wife filed an I-751 petition to remove the condition on his status, but they did not include the correct filing fee. Pet. App. 10a. On April 29, 1992—one week past the statutory deadline—petitioner and his wife filed an I-751 petition with the correct fee. *Ibid.*; see 8 U.S.C. 1186a(d)(2)(A) (stating deadline).

Although petitioner's I-751 petition was untimely, the INS considered it. Pet. App. 10a; see 8 U.S.C. 1186a(d)(2)(B) (allowing consideration of untimely petitions for good cause); 8 C.F.R. 216.4 (same). In August 1992, the INS interviewed petitioner and his wife regarding their marriage. Because petitioner and his wife "provided little documentary evidence that their marriage was bona fide," the INS decided to investigate further. Pet. App. 10a. According to Wisconsin Department of Transportation records, petitioner and his wife lived at two different addresses. *Id.* at 11a. When INS agents visited the first address, the landlady told them that petitioner's wife was a tenant, that petitioner had never lived there, and that petitioner's wife "had been in a romantic relationship with a man other than [petitioner] for the previous three years." *Ibid.* When INS agents visited the second address, they found petitioner's wife living there; she "informed [them] that she and [petitioner] had separated approximately three years earlier." *Ibid.* Petitioner's wife also told the agents that she and petitioner had lied at the August 1992 interview when they told the agents that they were living together at the same address. *Ibid.* Petitioner's wife said that petitioner was living in Moscow and that she did not have an address for him. *Ibid.*

In May 1995, while the Form I-751 was pending, petitioner left the United States. Pet. App. 11a n.5. When he attempted to return in July 1995, petitioner was paroled into the United States. *Ibid.* A "paroled" alien is an alien without legal immigration status who is granted permission to enter the United States temporarily pending a decision on the alien's application for admission. 8 U.S.C. 1182(d)(5). An alien who is paroled under Section 1182(d)(5) is not considered to have been admitted into the United States. 8 U.S.C. 1182(d)(5)(A). An alien like petitioner who was paroled into the United States before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, normally was placed into exclusion rather than deportation proceedings upon revocation of parole.[1]

In September 1995, petitioner's attorney sent the INS a letter stating that petitioner and his wife were getting divorced and asking the INS to waive the joint petition requirement. Pet. App. 12a n.6.

In March 1996, the INS District Director denied the I-751 petition on the ground that petitioner failed to prove that his marriage was bona fide. Pet. App. 11a-12a; see Administrative Record (A.R.) 268-271 (letter to petitioner detailing District Director's findings). Based on the "dearth of evidence indicating that the marriage between [petitioner's wife] and [petitioner] was *bona*

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[1] Before April 1, 1997, the INA provided two types of proceedings to remove aliens from the United States: "deportation," for aliens who had entered the United States but later became subject to expulsion, and "exclusion," for aliens who were ineligible for entry into the United States and were never admitted. IIRIRA combined deportation and exclusion hearings into a unified "removal" proceeding. See Pet. App. 21a n.9.

fide," the investigation conducted by INS agents, and the fact that petitioner and his wife were getting divorced, the District Director concluded that petitioner and his wife "were involved in a marriage of convenience for the purpose of obtaining immigration benefits." Pet. App. 12a. The INS then initiated proceedings to exclude petitioner from the United States. *Ibid.*

3. Petitioner was charged with being excludable on three grounds: as an alien seeking to enter the United States for the purposes of performing skilled or unskilled labor, see 8 U.S.C. 1182(a)(5)(A)(i); as an alien who committed fraud to secure an immigration benefit, see 8 U.S.C. 1182(a)(6)(C)(i); and as an alien seeking to enter the United States without a valid or unexpired visa, see 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. App. 12a; A.R. 300. Petitioner denied the charges of excludability and sought termination of his exclusion proceedings and review of the INS's denial of his I-751 petition. Pet. App. 13a.

The immigration judge (IJ) found petitioner excludable and ordered him removed from the United States. A.R. 182-190; see Pet. App. 13a-14a. The IJ first held that petitioner was properly placed in exclusion proceedings because he left the United States and was paroled back in. The IJ explained that "any alien granted parole, including one granted advance parole, is deemed an applicant for admission to the United States once the parole has expired" and "may unquestionably be placed in exclusion proceedings." A.R. 187. Here, petitioner's parole expired when the INS denied his I-751 petition. A.R. 187-188. The IJ then held that petitioner was not entitled to review of his I-751 petition because at that time (prior to IIRIRA), there was "no [statutory] provision giving immigration judges the authority to review

the denial of an I-751 in exclusion proceedings." A.R. 188. Finally, the IJ determined that petitioner was excludable on the first and third grounds charged. A.R. 190. The IJ did not sustain the second charge of excludability, explaining that the March 1996 determination that petitioner's marriage was a sham did not make his earlier entry into the United States fraudulent. A.R. 191.

4. The Board of Immigration Appeals (Board) affirmed the IJ's decision, held that petitioner was excludable, and ordered him deported from the United States. A.R. 85-87; see Pet. App. 14a. The Board upheld the IJ's denial of petitioner's motion to terminate exclusion proceedings, explaining that petitioner's failure to file a timely I-751 petition automatically terminated his lawful resident status on the two-year anniversary of the granting of conditional lawful residency, and that that status was not restored by the INS's consideration of the untimely I-751 petition. A.R. 86. As a result, the Board explained, petitioner was not a conditional permanent resident at the time he left the United States, and he was appropriately placed in exclusion proceedings. *Ibid.* The Board also agreed with the IJ that the IJ could not review the denial of petitioner's I-751 petition. *Ibid.* Finally, the Board upheld the finding of excludability on the grounds found by the IJ. A.R. 87.

Petitioner filed a motion to reopen and reconsider with the Board. A.R. 12-20; see Pet. App. 15a. He argued that the INS was estopped from excluding him because it had advised him to seek advance parole before leaving the United States, and he sought to raise a variety of new claims for relief, such as asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrad-

ing Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. A.R. 15-19.

The Board denied the motion. A.R. 2-3. The Board determined that petitioner failed to meet the standard for reopening or reconsideration, because he "present-[ed] the same arguments previously argued without success on appeal or arguments without basis in law or fact." A.R. 2. The Board noted that petitioner "ha[d] not identified any change in the law affecting his appeal nor has he identified an aspect of the appeal which we overlooked during our initial review." A.R. 3. The Board also determined that petitioner "failed to present sufficient evidence to show his *prima facie* eligibility for asylum, withholding of removal, and Convention Against Torture relief or explain why he failed to previously apply for such relief." A.R. 2-3.

5. Petitioner filed petitions for review of the Board's initial decision and its decision denying the motion to reopen and reconsider, which the court of appeals consolidated.

The court of appeals denied the petitions for review in an unpublished, non-precedential order. Pet. App. 63a-68a. The court first held that the Board did not abuse its discretion in denying petitioner's request to terminate exclusion proceedings, explaining that when petitioner "failed to file his I-751 petition within two years of the date he was granted conditional permanent resident status, that status terminated 'automatic-[ally].'" *Id.* at 65a (quoting 8 C.F.R. 216.4(a)(6) (1992)). The court explained that "when [petitioner] traveled to Russia while his petition was still pending, he was not a lawful permanent resident, but rather a petitioner seeking to have that status restored." *Ibid.* The court deter-

mined that the INS "was therefore correct when it advised [petitioner] that he must obtain advance parole in order to travel abroad and return to the United States." *Ibid.* Further, the court explained, petitioner's parole "did not operate as an admission into" the United States, and petitioner therefore was "properly placed in exclusion * * * proceedings." *Id.* at 65a-66a. The court rejected petitioner's argument that the INS engaged in affirmative misconduct in advising him to seek advance parole before leaving the United States, both because its "advice was substantially correct" and because the INS "was under no obligation to provide an individualized warning as to the potential consequences of accepting the benefits of advance parole." *Id.* at 65a n.2.

The court then agreed with the Board that "[a]liens in exclusion proceedings, unlike those in deportation proceedings, are not entitled to review of the denial of an I-751 petition." Pet. App. 66a. The court rejected petitioner's equal protection challenge to that statutory framework, explaining that "Congress rationally could have determined that those aliens who choose to leave the country while their applications to adjust or restore status are pending, and who are aware of their precarious situation at the time they leave, could be subject to lesser rights and safeguards upon their return and parole." *Ibid.*

Finally, the court concluded that the Board did not abuse its discretion in denying petitioner's motion to reopen or reconsider. Pet. App. 67a-68a. The court determined that the Board did not abuse its discretion in denying reconsideration because petitioner "failed to identify any errors of fact or law in its previous decision, and primarily repeated arguments that the [Board] had already considered." *Id.* at 67a. The court also held that

the Board "acted within its discretion in denying [petitioner's] request for reopening," because it rationally could have decided that petitioner "failed to establish a prima facie case of * * * future persecution." *Id.* at 67a-68a. The Board gave a variety of reasons for such a determination: petitioner's "family's experiences under Stalin were too remote"; "his own experiences of discrimination [were] insufficiently severe to constitute persecution"; petitioner "admitted that he did not fear persecution at the time he first entered the United States"; "his vague allegations and translated newspaper headlines were insufficient to establish a material increase in anti-Semitism in Russia"; and "he failed to explain why he never applied for asylum previously." *Id.* at 68a.

Petitioner filed a petition for rehearing, which was denied.

6. Petitioner then filed this action in federal district court, contending that the INS's denial of his I-751 petition was unlawful. Pet. App. 19a, 59a.

The district court dismissed the complaint for lack of subject matter jurisdiction, and, in the alternative, held that petitioner's claims were barred by res judicata and collateral estoppel. Pet. App. 7a-26a. First, the court explained that the district court lacked the authority to hear a challenge to petitioner's exclusion order under 8 U.S.C. 1252(a)(5), which provides that "a petition for review filed with an appropriate court of appeals" in compliance with Section 1252 "shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of [the INA]." See Pet. App. 20a. The court explained that in light of the statute's broad language, it has "consistently held that [district] courts lack jurisdiction to consider chal-

lenges to administrative orders of removal, deportation, and exclusion, however they are presented." *Id.* at 21a (citing cases). The court noted that, in enacting Section 1252(a)(5), "Congress clearly intended to have all challenges to removal orders heard in a single forum, i.e., the courts of appeals." *Id.* at 22a (internal quotation marks omitted). The court concluded that "[b]ecause, on any fair reading, the complaint challenges [petitioner's] exclusion order, it must be dismissed because it has been brought in a court that lacks jurisdiction to hear the matter." *Ibid.*

The court then held, in the alternative, that "[i]f there were jurisdiction to consider the issues raised in the complaint," the court would "dismiss the action as barred by res judicata." Pet. App. 22a-26a. The court explained that the court of appeals, in petitioner's prior petitions for review, "considered, and rejected, substantially the same claims raised here," and that "to the (limited) extent that the pleading could be construed to raise new issues, they arise out of the same nucleus of operative facts as the issues adjudicated in" the prior appeal and "should have been brought to light in" that case. *Id.* at 22a. The court explained that to the extent petitioner seeks review of the denial of his I-751 petition, the court of appeals had already held that review is not available because petitioner was properly classified as an excludable alien. *Id.* at 22a-23a. The court noted that "[e]ven if [petitioner] presented * * * a previously unraised argument over the denial of his I-751 petition, the claim would * * * be barred as *res judicata*" because it arose from the same nucleus of operative fact as petitioner's other claims. *Id.* at 24a-25a. Finally, the district court determined that, to the extent that the complaint "recycles [petitioner's] constitutional chal-

lenges," the court of appeals had previously rejected those claims as well, so they too were barred by res judicata. *Id.* at 23a.

7. The court of appeals affirmed in an unpublished, non-precedential opinion, Pet. App. 3a-6a, "for the substantive reasons detailed in the District Court's opinion." *Id.* at 6a.

Petitioner filed a petition for rehearing en banc, which the court denied. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 6-11) that the court of appeals erred in affirming the district court's decision, which dismissed his claims for lack of subject-matter jurisdiction and because they are barred by res judicata. The court of appeals' decision is correct. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals, and he is mistaken in contending that the decision below conflicts with a decision of this Court. Moreover, this case would present a poor vehicle for considering the underlying legal issues because the court of appeals simply affirmed the district court's decision, without further elaboration, and the court of appeals' unpublished opinion does not create binding circuit precedent. Further review of petitioner's fact-bound claims is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's holding that it lacked subject-matter jurisdiction over petitioner's claims. The district court relied upon 8 U.S.C. 1252(a)(5), which is entitled "Exclusive means of review." It provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sec-

> tions 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter.

8 U.S.C. 1252(a)(5). Through that provision, Congress made clear that the "sole and exclusive" means to challenge a removal order is a petition for review filed in the appropriate court of appeals.[2] Petitioner, therefore, was required to challenge his exclusion order through a petition for review in the court of appeals—as he did in his first trip to the Second Circuit—and he was not also entitled to challenge the exclusion order in federal district court.

Congress's intent is confirmed by another provision in Section 1252, which states that no other court may hear challenges to removal orders. Section 1252(b)(9) states that "[j]udicial review of all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States" is available only as stated in Section 1252; and that subject to very limited exceptions, "no court shall have jurisdiction, by habeas corpus under Section 2241 of title 28, or any other habeas corpus provision * * * or by any other provision of law * * * to review such an order or such questions of law or fact." 8 U.S.C. 1252(b)(9). As the district court explained, Section 1252 codifies Congress's determination that an alien's challenge to the agency's determination to exclude, deport, or remove

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[2] As the district court correctly stated, Section 1252(a)(5)'s reference to "an order of removal" has been understood to refer to orders of removal entered post-IIRIRA and orders of exclusion and deportation entered pre-IIRIRA. Pet. App. 21a (citing cases).

him may only be raised through a petition for review of the Board's decision filed with the appropriate court of appeals. Pet. App. 21a.

Petitioner contends (Pet. 9-10) that Section 1252(a)(5) does not apply because he was not seeking to challenge his exclusion order, but rather the denial of his I-751 petition. That case-specific disagreement with the courts below does not warrant this Court's review, and, in any event, petitioner is mistaken. As the district court correctly explained, "on any fair reading, the complaint challenges [petitioner's] exclusion order." Pet. App. 22a. The complaint sought an order declaring the INS's denial of his I-751 petition to be "invalid" and "unlawful." *Id.* at 30a. But because petitioner was an alien properly in exclusion proceedings, he was "not entitled to review of the denial of an I-751 petition." *Id.* at 66a; see 8 U.S.C. 1186a(c)(3)(D) (providing for review of termination of permanent resident status only in deportation proceedings). That issue was litigated before the Board, and petitioner sought further review in the court of appeals. The court of appeals upheld the exclusion order on direct review, sustaining the Board's ruling that petitioner could not obtain review of the denial of his I-751 petition in exclusion proceedings and holding that the Board accordingly did not abuse its discretion in declining to terminate exclusion proceedings. Pet. App. 66a. Petitioner cannot revisit that decision now by attempting to reframe his claim when the relief he seeks is to remain in the United States contrary to his final order of exclusion. That is especially true in light of the broad language in Section 1252(a)(5), which manifests Congress's clear intent that any issues relating to re-

moval proceedings be heard only on petition for review in the appropriate court of appeals.[3]

In any event, even if petitioner were correct that the district court had jurisdiction over his claim, that conclusion would not change the result in this case. As described above (see pp. 3-5, *supra*), the INS District Director had ample basis to conclude that petitioner's marriage was a sham and that the I-751 petition should be denied. Petitioner and his wife provided little evidence of a bona fide marriage, and the INS investigation uncovered substantial evidence to the contrary, including evidence that petitioner and his wife were living apart, had other romantic partners, and were in the process of getting divorced. See Pet. App. 9a-11a. Petitioner does not take issue with this conclusion in his certiorari petition. Thus, even if he had conditional resident status and could challenge the denial of his I-751 petition, he would not prevail.

Finally, the question whether the courts have jurisdiction to review the denial of an I-751 petition filed by an alien who is in exclusion proceedings has little continuing significance, because Congress repealed the provisions for exclusion proceedings and deportation pro-

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[3] Petitioner suggests that there must be a presumption in favor of judicial review of administrative action (Pet. 10), but he received that review in the court of appeals' first decision. Tellingly, petitioner has not identified any court that has read 8 U.S.C. 1252(a)(5) to allow a district court to review a claim like his.

Petitioner also contends (Pet. 10-11) that the court of appeals' decision is inconsistent with Board precedent. He is mistaken. The decisions he cites addressed the issue of jurisdiction over an application to adjust status filed by an arriving alien in removal proceedings or an alien in exclusion proceedings, not the issue of whether a challenge to the denial of a petition to remove conditions on resident status constitutes review of an order of exclusion addressed adjustment of status.

ceedings in IIRIRA in 1996. See p. 4 & n.1, *supra*. No new exclusion proceedings have been commenced since that time, and only a small and diminishing number of aliens are still pursuing judicial review of exclusion orders fourteen years later. Under the current statutory framework, all aliens may obtain review of the denial of an I-751 petition in their removal proceedings; there is no longer a distinction between exclusion and deportation proceedings. See 8 U.S.C. 1186a(b)(2). For that reason as well, the petition should be denied.

2. The court of appeals also correctly affirmed the district court's alternative holding that petitioner's claims were in any event barred. As the court of appeals has explained, under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Legnani* v. *Alitalia Linee Aeree Italiane, S.P.A.*, 400 F.3d 139, 141 (2d Cir. 2005); see also, *e.g.*, *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 (2008).

The claims petitioner raised in his complaint already had been considered and rejected by the court of appeals. Accordingly, petitioner's claims were barred by the court of appeals' mandate in the first case and by res judicata principles. Pet. App. 22a. For example, petitioner's complaint sought review of the INS's denial of his I-751 petition and restoration of his conditional resident status, *id.* at 30a, 60a, but the court of appeals had already held that petitioner's conditional permanent resident status expired and that review of the denial of his I-751 petition was unavailable because he was properly in exclusion proceedings, *id.* at 65a-66a. Petitioner's complaint also recycled his constitutional challenges to the Board's determination that the denial of

his I-751 was unreviewable, *id.* at 55a-59a, claims the court of appeals already had rejected, *id.* at 66a. To the extent petitioner sought to raise new claims before the district court arising from those events, they are barred by res judicata. See, *e.g.*, *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action." (emphasis added)). This case and petitioner's earlier petition for review unquestionably share a common nucleus of fact—namely, petitioner's failure to obtain lawful resident status through his marriage to a United States citizen.

Petitioner contends (Pet. 7) that the court of appeals' denial of his initial petition for review was not a "final judgment on the merits" because the court of appeals did not review the INS's determination that his marriage was a sham. But the court of appeals considered petitioner's challenge to the denial of his I-751 petition and determined that petitioner lost his conditional permanent resident status and therefore was not entitled to seek review of the denial of his I-751 petition. That was a final disposition on the merits of his claim based on the denial of his I-751 petition. Cf. *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 92 (1998) (scope of cause of action "goes to the merits"); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) ("failure to state a proper cause of action calls for a judgment on the merits"). Moreover, petitioner is wrong to suggest (Pet. 6) that the decision below conflicts with this Court's decision in *Federated Department Stores* because it does not require a final decision on the merits. The district court *did* require such a final decision; indeed, it stated and applied the same legal

standard that this Court did in *Federated Department Stores*. See Pet. App. 23a-24a.

In any event, even if petitioner's claims were not barred, the result would be the same, because as the court of appeals correctly explained, aliens in exclusion proceedings are not entitled to review of the denial of an I-751 petition. Pet. App. 65a-66a. And, even if petitioner could obtain such review, he would not prevail, because it is his burden to establish that his marriage was bona fide, 8 C.F.R. 216.4(d)(2) (1995), and there was ample evidence that his marriage was a sham, entered into to obtain immigration benefits. See pp. 3-5, *supra*. Finally, this case would be a poor vehicle for consideration of any res judicata issues, because the court of appeals' judgment would still be correct based on another ground—that Section 1252 independently precluded petitioner from challenging his exclusion order in district court. See pp. 12-14, *supra*. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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